

A Ong Thye Peng v Loo Choo Teng & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02-804 OF 2000
MOHD NOOR AHMAD FCJ, RICHARD MALANJUM AND MOHD
GHAZALI JJCA

B 9 APRIL 2004

Succession — Administration — Sale of land — Sale of deceased's immovable properties subject to court sanction — Sale and purchase agreement made in 1978 — Whether court should grant sanction for sale of land at current market value instead of price stated in 1978 agreement

C *Succession — Administration — Sale of land — Sale of deceased's immovable properties subject to court sanction — Sale of properties by trustees — Whether trustees had power of sale*

D On 25 August 1975, the High Court ordered that the estate of one Ong Joo Sun ('the deceased') be administered according to the terms of his will and that his immovable properties (including a piece of land in Penang) be sold and the proceeds of sale be paid into court to the credit of his estate. Meanwhile, in April 1975, the State Government of Penang declared its intention to acquire the said land. By a sale and purchase agreement dated 8 January 1978 ('the SPA') executed between the first and second respondents ('the trustees') and the third to the eighth respondents ('the purchasers'), the trustees sold the said land to the purchasers at a price of RM1.60 per sq ft. The SPA provided that the sale was subject to an order of court and subject further to the said land being released by the State Government from acquisition. In 1981, the purchasers instituted proceedings against the trustees for specific performance of the SPA ('the 1981 civil suit'). The learned High Court judge in the 1981 civil suit ordered the trustees to specifically perform the SPA.

F The trustees appealed but the Court of Appeal upheld the finding of the High Court in the 1981 civil suit that the SPA was valid and binding on the parties and accordingly dismissed the appeals. As a result of the decision of the Court of Appeal, the trustees, by way of originating summons, sought the following reliefs at the High Court: (a) the trustees be given permission to sell the said land pursuant to the SPA and in accordance with the Probate and Administration Act 1959 ('the Act'); and (b) the trustees be given permission to sell the said land to the purchasers at the market value as at the date of approval of the High Court or at such other price as the court may deem fit or proper. The learned High Court judge granted the first relief sought but refused the second prayer sought. Consequently, formal sanction was granted

G to the trustees for the sale of the said land upon the terms of the SPA, namely, at RM1.60 per sq ft. This was the appeal by the beneficiary, who was a defendant in the 1981 civil suit ('the appellant').

H

Held, dismissing the appeal:

- I** (1) (per **Mohd Noor Ahmad FCJ**) As RM1.60psf was reflective of the then market price, it was manifestly evident that the trustees had obtained the best price for the beneficiaries of the estate (see para 4).

- (2) (per **Mohd Noor Ahmad FCJ**) The accepted principles adopted by the courts on an application for leave to sell a deceased estate were established in cases cited. Be that as it may, the facts might vary from case to case and therefore, they could be distinguished. It was unwise to apply the principles established as a straightjacket to the present case (see para 5).
- (3) (per **Mohd Noor Ahmad FCJ**) The learned judge, in departing from the principles established in the cases cited, was not wrong both on principle and common sense. On principle, having regard to the facts and surrounding circumstances of the instant case, if the test of reasonableness of the price was to be based on the market value of the property at the time of the hearing of the application for sanction, that would militate against two other principles of law, namely, that the court could not rewrite the parties' agreement and that a party should never take advantage of his own wrong. As the learned judge had exercised his discretion judiciously on the matter, his decision needed no appellate interference (see para 6).
- (4) (per **Mohd Ghazali JCA**) The only issue to be decided in this appeal was whether the learned High Court judge had exercised his discretion judiciously when he granted sanction for the sale of the said land upon the terms of the SPA, namely, at RM1.60 per sq ft. The evidence showed that the appellant and the other beneficiaries were fully aware of the SPA, the price and the 1981 civil suit. The SPA made it mandatory for the trustees to apply to court for 'a formal sanction' to sell the said land in accordance with the Act. When the learned High Court judge granted the sanction, it was confined to the terms of the SPA and as at the date of the SPA. The learned judge had taken all factors into consideration and there was nothing wrong with his exercise of discretion in granting the sanction (see paras 42 and 46).
- (5) (per **Mohd Ghazali JCA**) The trustees had the power of sale as the High Court had on 25 August 1975, given them the power to sell the said land subject to affirmation by a judge. The appellant and the other beneficiaries did not object to the sale at the material time. A valuation report was obtained at the time of the sale in 1979. It was also not disputed that the acquisition value was only RM0.60 per sq ft (see para 47); *Che Ah and Che Yang Kelsom v Che Ahmad* (1941) 10 MLJ (FMSR) 126, *Re the Estate of Tunku Mohamed Jawa ibni Almarhum Sultan Abdul Hamid, deceased Tunku Ismail bin Tunku Mohamed Jawa & Anor v Tunku Baharom bin Tunku Mohamed Jawa & Ors* [1982] 2 MLJ 44 and *Yap Yoke Luan & Ors v Ong Wee Tok & Ors* [1984] 1 MLJ 23 distinguished.
- (6) (per **Richard Malanjum JCA** dissenting) The SPA stated that the trustees must apply for sanction from the High Court. As such, the primary function of the High Court when exercising its discretion was to consider the interests of the beneficiaries to the estate of the deceased. Accordingly, the ultimate question was to consider whether the High Court judge exercised his discretion when considering the application and if so, whether there was a proper exercise according to law (see paras 71 and 72).

A

B

C

D

E

F

G

H

I

- A (7) (per **Richard Malanjum JCA** dissenting) The Court of Appeal in its judgment in the first appeal stated that ‘... should sanction be refused by the court, it would be open to the vendors to move for the decree to be vacated on the ground of impossibility of performance’. The foregoing was a clear indication that proper exercise of discretion was expected from the High Court judge. It was not the intention of the Court of Appeal in the first appeal to stifle the discretion of the High Court judge merely by the usage in the judgment of the words ‘apply to court for formal sanction’. Unfortunately, the High Court judge appeared to have taken that position. As such, there was no reason to accept that the High Court judge had exercised his discretion when granting the sanction as he did (see paras 73 and 76).
- B
- C (8) (per **Richard Malanjum JCA** dissenting) However, even if the High Court judge did exercise his discretion, he did not do so according to law. He took into account irrelevant matters or failed to take into account relevant matters. For example, the High Court judge held the view that he had no choice but to obey the decision of the Court of Appeal in the first appeal in that any sanction given should be reflective of the terms of the SPA, particularly, the sale price. The trial judge also appeared to hold the view that the sanction to be given was a foregone conclusion. He failed to consider that refusal as indicated by the Court of Appeal in the first appeal was an option available to him (see para 77).
- D
- E

[Bahasa Malaysia summary]

- Pada 25 Ogos 1975, Mahkamah Tinggi telah memberi perintah bahawa estet Ong Joo Sun (‘si mati’) ditadbir menurut terma-terma wasiat beliau dan bahawa harta tak alih (termasuk sebidang tanah di Pulau Pinang) dijual dan hasil jualan dibayar ke dalam mahkamah kepada kredit estet beliau. Pada April 1975, Kerajaan Negeri Pulau Pinang mengisytiharkan niatnya untuk memperoleh tanah itu. Melalui satu perjanjian jual beli bertarikh 8 Januari 1978 (‘PJB’) yang dilaksanakan di antara responden-responden pertama dan kedua (‘pemegang-pemegang amanah’) dan responden-responden ketiga hingga kelapan (‘pembeli-pembeli’), pemegang-pemegang amanah menjual kepada pembeli-pembeli pada harga RM1.60kps. PJB itu memperuntukkan bahawa jualan itu tertakluk kepada satu perintah mahkamah dan tertakluk juga kepada tanah itu dilepaskan oleh Kerajaan Negeri daripada diambil. Pada 1981, pembeli-pembeli memulakan prosiding terhadap pemegang-pemegang amanah untuk pelaksanaan spesifik PJB itu (‘guaman 1981’). Hakim mahkamah tinggi yang arif telah di dalam guaman 1981 itu memberi perintah kepada pemegang-pemegang amanah untuk melaksanakan PJB itu secara spesifik. Pemegang-pemegang amanah merayu tetapi Mahkamah Rayuan telah menolak rayuan itu. Akibat daripada keputusan Mahkamah Rayuan itu, pemegang-pemegang amanah itu, melalui saman pemula, telah memohon relif-relif di Mahkamah Tinggi: (a) pemegang-pemegang amanah diberi kebenaran untuk menjual tanah itu menurut PJB dan menurut Akta Probet dan Pentadbiran 1959 (‘Akta itu’); (b) pemegang-pemegang amanah diberi kebenaran untuk menjual tanah itu kepada pembeli-pembeli pada harga
- F
- G
- H
- I

pasaran seperti pada tarikh kelulusan oleh Mahkamah Tinggi atau pada harga lain yang difikirkan suai manfaat oleh mahkamah. Hakim Mahkamah Tinggi yang arif membenarkan relif pertama yang dipohon tetapi menolak permohonan kedua. Berikutannya, sanksi sah telah diberi kepada pemegang-pemegang amanah untuk jualan tanah di atas terma-terma PJB, iaitu pada RM1.60kps. Ini adalah rayuan benefisari, iaitu seorang defendan di dalam guaman 1981 itu ('perayu').

Diputuskan, menolak rayuan tersebut:

- (1) (oleh **Mohd Noor Ahmad HMP**) Memandangkan RM1.60kps adalah gambaran harga pasaran semasa, ia amat jelas bahwa pemegang amanah mempunyai harga terbaik untuk benefisiari harta pusaka tersebut (see para 4).
- (2) (oleh **Mohd Noor Ahmad HMP**) Prinsip-prinsip yang diterimapakai yang digunakan oleh mahkamah untuk permohonan memohon kebenaran menjual harta pusaka si mati telah ditetapkan dalam kes-kes yang dipetik. Namun begitu, fakta-fakta mungkin berbeza dari satu kes ke satu kes dan oleh itu, kes-kes ini boleh dibezakan. Tidaklah sesuai untuk menggunakan prinsip-prinsip yang telah ditetapkan tersebut sebagai panduan untuk kes semasa (lihat perenggan 5).
- (3) (oleh **Mohd Noor Ahmad HMP**) Hakim yang bijaksana, yang tidak memakai prinsip-prinsip yang ditetapkan dalam kes-kes yang dipetik, adalah tidak salah kedua-dua atas prinsip dan akal. Berdasarkan prinsip, dengan mengambilkira fakta-fakta dan keadaan kes semasa, jika ujian kemunasabahan harga berasaskan nilai pasaran hartanah pada masa perbicaraan permohonan sanksi tersebut, yang akan menghalang dua prinsip lain, iaitu, bahawa mahkamah tidak boleh menulis semua perjanjian pihak-pihak dan bahawa satu pihak tidak sepatutnya mengambil kesempatan ke atas kesalahannya. Memandangkan hakim yang bijaksana telah menggunakan budi bicara beliau dengan adil dalam perkara tersebut, keputusan beliau tidak memerlukan campur tangan pihak rayuan (lihat perenggan 6).
- (4) (oleh **Mohd Ghazali HMR**) Satu-satunya isu yang perlu diputuskan di dalam kes ini adalah sama ada hakim Mahkamah Tinggi yang arif telah menggunakan budi bicara beliau dengan adil apabila beliau memberikan sanksi untuk jualan tanah itu di atas terma-terma PJB, iaitu RM1.60kps. Keterangan menunjukkan perayu dan benefisiari-benefisiari yang lain sedar akan PJB, harga jualan dan guaman 1981. PJB telah menjadikannya mandatori untuk pemegang-pemegang amanah memohon kepada mahkamah untuk 'formal sanction' untuk menjual tanah itu menurut Akta itu. Apabila hakim Mahkamah Tinggi membenarkan sanksi itu, ia terhad kepada terma-terma PJB dan seperti pada tarikh PJB. Hakim Yang Arif telah mempertimbangkan semua faktor-faktor dan penggunaan budi bicara beliau di dalam membenarkan sanksi itu tidak salah (lihat perenggan 42 dan 46).
- (5) (oleh **Mohd Ghazali HMR**) Pemegang-pemegang amanah mempunyai kuasa jualan memandangkan Mahkamah Tinggi telah memberi kepada

A

B

C

D

E

F

G

H

I

- A** mereka kuasa untuk menjual tanah itu tertakluk kepada pengesahan oleh hakim pada 25 Ogos 1975. Perayu dan benefisiari-benefisiari yang lain tidak membantah kepada jualan itu pada masa material. Satu laporan penilaian telah didapati pada masa jualan itu pada 1979. Ia juga tidak dipertikaikan bahawa nilai pemerolehan hanya RM0.60kps (lihat perenggan 47); *Che Ah and Che Yang Kelsom v Che Ahmad* [1941] MLJ 126, *In Re The Estate of Tunku Mohamed Jawa ibni Almarhum Sultan Abdul Hamid, deceased Tunku Ismail bin Tunku Mohamed Jawa & Anor v Tunku Baharom bin Tunku Mohamed Jawa & Ors* [1982] 2 MLJ 44 dan *Yap Yoke Luan & Ors v Ong Wee Tok & Ors* [1984] 1 MLJ 23 dibeza.
- B**
- C** (6) (oleh **Richard Malanjum HMR** menentang) PJB menyebut bahawa pemegang amanah mesti memohon keizinan daripada Mahkamah Tinggi. Oleh itu, fungsi utama Mahkamah Tinggi adalah untuk mempertimbangkan kepentingan benefisiari estet si mati. Sewajarnya, soalan utama adalah untuk membuat pertimbangan sama ada hakim Mahkamah Tinggi menggunakan budibicaranya semasa mempertimbangkan permohonan tersebut dan jika demikian, sama ada ia adalah penggunaan yang betul mengikut undang-undang (lihat perenggan 71 dan 72).
- D**
- (7) (oleh **Richard Malanjum HMR** menentang) Mahkamah Rayuan dalam penghakiman rayuan pertama menyebut bahawa ‘... should sanction be refused by the court, it would be open to the vendors to move for the decree to be vacated on the ground of impossibility of performance’. Di sini amat jelas bahawa penggunaan budibicara yang betul dijangka daripada hakim Mahkamah Tinggi. Bukan niat Mahkamah Rayuan dalam rayuan pertama untuk menyekat budibicara hakim Mahkamah Tinggi hanya dengan penggunaan dalam penghakiman perkataan-perkataan ‘apply to court for formal sanction’. Walau bagaimanapun, hakim Mahkamah Tinggi seolah-olah telah mengambil pendirian itu.
- E**
- F** Oleh yang demikian, tidak ada sebab untuk menerima bahawa hakim Mahkamah Tinggi menggunakan budibicaranya apabila memberi keizinan itu seperti yang dilakukan olehnya (lihat perenggan 73 dan 76).
- (8) (oleh **Richard Malanjum HMR** menentang) Walau bagaimanapun, jika hakim Mahkamah Tinggi telah menggunakan budibicaranya, beliau tidak berbuat begitu mengikut undang-undang. Contohnya, hakim Mahkamah Tinggi memegang pandangan bahawa tidak ada pilihan tetapi untuk mengikut keputusan Mahkamah Rayuan dalam rayuan pertama dan sebarang keizinan yang diberikan mesti mencerminkan terma perjanjian jualbeli khasnya harga jual. Hakim bicara juga memegang pandangan bahawa keizinan untuk diberi adalah satu perkara yang sudah pasti. Beliau gagal untuk mempertimbangkan bahawa keengganan seperti ditunjukkan oleh Mahkamah Rayuan dalam rayuan pertama adalah satu pilihan untuk beliau (lihat perenggan 77).]
- G**
- H**

Notes

- I** For cases on administration of sale of land, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2022–2048.
For succession, see 4 *Halsbury's Laws of Malaysia*.

Cases referred to

Che Ah and Che Yang Kelsom v Che Ahmad [1941] MLJ 126 (dstd)
Cheok Swee Lee & 5 Ors v Loo Choo Teng & 3 Ors [1996] 3 CLJ 433 (refd)
Cheok Swee Lee & Ors v Loo Choo Teng & Ors [1997] 4 CLJ 587 (refd)
Loo Choo Teng & Anor v Cheok Swee Lee & Ors and another appeal [2000] 2MLJ 257 (refd)
Loo Choo Teng & Anor v Cheok Swee Lee & Ors [2001] 1 MLJ 216 (refd)
Tunku Mohamed Jawa ibni Almarhum Sultan Abdul Hamid, deceased Tunku Ismail bin Tunku Mohamed Jawa & Anor, In Re The Estate of v Tunku Baharom bin Tunku Mohamed Jawa & Ors [1982] 2 MLJ 44 (dstd)
Yap Yoke Luan & Ors v Ong Wee Tok & Ors [1984] 1 MLJ 23 (dstd)

Legislation referred to

Land Acquisition Act 1960
 Probate and Administration Ordinance 1959 s 60(4)

Appeal from : Saman Pemula 24–330 of 2000 (Petisyen 232 Tahun 1960) (High Court, Pulau Pinang)

Ghazi Ishak (Ong Kheng Leong with him) (Ghazi & Lim) for the appellant.
Romesh Abraham (P Aruna with him) (Shook Lin & Bok) for the first and second respondents.
R Rajasingam (RR Sethu with him) (R Rajasingam & Co) for the third to the eighth respondents.

Mohd Noor Ahmad FCJ:

[1] I have had the benefit of reading the draft judgment of my learned brother Mohd Ghazali Mohd Yusoff JCA. I am in full agreement with him. However, I would like to add.

[2] The only issue before us is whether the learned judge had under the circumstances exercised his discretion judiciously when he granted the sanction for the sale of the property upon the terms of the agreement, that is to say, at RM1.60psf.

[3] The following facts are beyond dispute and pertinent.

- (1) The agreement was valid and binding upon the parties and the trustees had been ordered by the Court of Appeal to specifically perform it. In order to do so, under cl 8 of the agreement the trustees had to apply to the court for a formal sanction to sell the property. Subsequently, the trustees applied for permission to sell the property to the purchasers at its market value as at the date of the approval by the court or at such other price as the court deems fit and proper.
- (2) The value of the property at the date of the agreement (8 January 1979) was RM1.60psf based on a valuation report obtained by the trustees and whereas the compulsory acquisition price was only RM0.60psf. However, the market value of the property around the time when the permission to sell was sought was RM28m, per valuation report as

- A** exhibited. When the agreement was entered into the appellant and the other beneficiaries agreed to sell at RM1.60psf but they do not agree now in view of the current market value of the property.
- (3) The reason why the sale and purchase was not performed by the trustees was not related to the consent of the beneficiaries or the value of the property but because of the compulsory acquisition of the property by the State which was released quite some time ago, and thereafter, the reason for the non-performance was due to a wilful refusal to perform the sale and purchase, rather than the non-fulfillment of any condition. In short, the trustees did not apply for the sanction for the last 19 years by reason of refusal to perform.
- B**
- C** [4] Premised on the aforesaid facts, the learned judge proceeded to determine whether or not to grant the sanction and at what price. He had meticulously considered those facts, in particular on the market value at the date of the agreement and the acquisition value and had decided as he did. To my mind, as RM1.60psf was reflective of the then market price, it is manifestly evident that the trustees had obtained the best price for the beneficiaries of the estate. Therefore, it is not apt to say that the learned judge had acted like a 'rubber stamp' when he granted the sanction.
- D**
- E** [5] I decline to follow the cases of *Yap Yoke Luan & Ors v Ong Wee Tok & Ors* [1984] 1 MLJ 23, *Che Ah and Che Yang Kelsom v Che Ahmad* [1941] MLJ 126, and *In Re The Estate of Tunku Mohamed Jewa ibni Almarhum Sultan Abdul Hamid, deceased Tunku Ismail bin Tunku Mohamed Jewa & Anor v Tunku Baharom bin Tunku Mohamed Jewa & Ors* [1982] 2 MLJ 44. I need not repeat the facts of those cases as they had been elaborated in the judgment of my learned brother. Suffice for me just to restate the principle established in the aforesaid cases. The accepted principles adopted by the courts on an application for leave to sell a deceased estate are: (i) the duty of the court is to protect the rights of the beneficiaries and not to consider the interests of the proposed purchaser; (ii) in exercising its discretion the court will have to look into the facts and surroundings circumstances of the case, that is to say, whether the proposed sale was favourable to the beneficiaries and whether the administrators had acted with proper prudence in exercising their overriding duty to obtain the best possible price; and (iii) the court is concerned that the price is a reasonable one not at the time the offer was made but at the time of hearing of the application. Be that as it may, the facts may vary from case to case and therefore, they can be distinguished, as done in the judgment of my learned brother. That being the case, it is unwise to apply the principle established in the aforesaid cases as a straightjacket to the present case which can be distinguished. To my mind, the learned judge in the exercise of his discretion had to a great extent adhered to the principle established in the aforesaid cases. He did scrutinize the facts and surroundings circumstances and by necessary implication, he was satisfied that the trustees had acted with proper prudence to obtain the best price for the beneficiaries of the estate and that the proposed sale at RM1.60psf, which was agreed to by the beneficiaries, was favourable to them. However, what the learned judge did not do is that he did not consider whether the price was a reasonable
- F**
- G**
- H**
- I**

one at the time of the hearing of the application, but he based the reasonableness of the price at the date of the agreement. Was the learned judge wrong in this departure from the principle established in the aforesaid cases? In my view, both on principle and common sense, he was not. On principle, having regard to the facts and surrounding circumstances of the case at hand, if the test of reasonableness of the price was to be based on the market value of the property at the time of the hearing of the application, that would militate against two other principles of law. The first principle is that the court cannot rewrite the parties' agreement (see *Law and Practice of Compromise* by David Foskett at p 81, (4th Ed) and quoted with approval by the Court of Appeal in *Lee Lim Huat v Yusuf Khan bin Ghows Khan & Anor* [1997] 3 CLJ 197). The second principle is that a party shall never take advantage of his own wrong (see *New Zealand Shipping Co v Societe des Ateliers et Chantiers de France* [1991] AC 1). On the first principle, the agreement clearly stipulated the sale price at RM1.60psf. In respect of the second principle, it is evidently clear that the trustees did not apply for the sanction for so long by reason of refusal to perform. On common sense, I decline to express of what is obvious to a reasonable man.

[6] As the learned judge had exercised his discretion judiciously on the matter, his decision needs no appellate interference. Therefore, I will dismiss the appeal with costs. The deposit is to be paid to the third to eighth respondents towards the account of taxed costs.

Mohd Ghazali JCA (delivering majority judgment):

[7] These proceedings revolve around a piece of land previously known as Lot 532, Mukim 12, Daerah Barat Daya, Penang and now known as Lot No 2347, Lot No 2348, Lot 2349 and Lot No 2350 all in Mukim 12, Daerah Barat Daya, Penang ('the property'). Ong Joo Sun, deceased ('the deceased') was, during his lifetime, the registered proprietor of the property. He died testate on 20 March 1960 and his will was proved on 13 December 1963.

[8] On 25 August 1975, the High Court ordered, inter alia, that the deceased's estate ('the estate') be administered according to the terms of his will and that his immovable properties be sold and the proceeds of sale be paid into court to the credit of his estate. Meanwhile, by Notification No 103 published in the *Gazette* on 25 April 1974, the State Government of Penang declared its intention to acquire the property.

[9] By sale and purchase agreement dated 8 January 1979 ('the agreement'), Loo Choo Teng ('the first respondent') and one Ong Thai Hong, described therein as the additional trustees of the estate appointed by an order of the court dated 15 August 1977 sold the property to the following persons, namely:

- (i) Cheok Swee Lee (the third respondent);
- (ii) Loh Peng Kwan (the fourth respondent);
- (iii) Loh Cheok Boon (the fifth respondent);
- (iv) Loh Yip Seng (the sixth respondent);

A

B

C

D

E

F

G

H

I

- A** (v) Loh Toa Thau @ Loh Eng Kim (the seventh respondent);
(vi) Loh Gan Teong (the eighth respondent);
(‘the purchasers’). Ong Gaik Kee (the second respondent) who was appointed as an additional trustee executed the agreement on behalf of the said Ong Thai Hong. I will hereafter refer to the first and second respondents as ‘the trustees’.
- B**
- C** [10] It was provided for in the agreement that the sale is subject to an order of court and the property being released by the State Government ‘from the restriction as published in the Government of Penang *Gazette* notification No 9 of 1974 and all other Government restrictions whatsoever’. It was also provided therein that the purchase price shall be RM1.60 per sq ft. The purchasers paid to the trustees as deposit a sum of RM150,000 which was equivalent to approximately 5% of the total of the purchase price. The purchase was subject to, inter alia, the following terms:
- D** (a) the property being released by the Penang State Government;
(b) the trustees deducing a good and marketable title to the property sold;
(c) the property sold to be free from all encumbrances whatsoever;
(d) without vacant possession;
- E** (e) completion of the purchase to be within six months from the date of court order sanctioning the sale by the trustees.
- F** [11] Clause 5 of the agreement provides if for whatsoever reasons the State Government refuse to release the property from the restrictions imposed under the Land Acquisition Act 1960 to the estate within two years from the date hereof, the agreement shall be null and void. Clause 7 provides the trustees shall apply to the State Government for the release of the property back to the estate for sale to the purchasers. Clause 8 provides the trustees shall also apply to court for a formal sanction to sell the property in accordance with the Probate and Administration Ordinance 1959.
- G** [12] Vide Civil Suit No 8 of 1981 in the High Court at Penang, the purchasers instituted proceedings against the trustees and the State Government of Penang for specific performance of the agreement (‘the 1981 civil suit’). The action against the State Government was later discontinued.
- H** [13] The appellant, one of the original executors and trustees of the deceased’s will, on his application, was added as a defendant in the 1981 civil suit. At the end of the day, the learned judge in the 1981 civil suit ordered that the trustees do specifically perform the agreement; he also made the following orders:
- I** (i) that the purchasers are to pay the balance sum (less RM361,114.80) into court on or before 8 October 1997;
(ii) that the trustees are to deliver the documents of title to the property on or before 8 October 1997;
(iii) that the trustees, within seven days from the date of payment of the balance sum (less RM361,114.80) are to execute (and or procure the

execution) a good and registrable transfer of the property free from all encumbrances in favour of the purchasers and deliver the memorandum of transfer duly executed to the purchasers' solicitors.

[14] The learned judge also ordered that in the event of the trustees failing to comply with directions (ii) and or (iii) above, it is ordered that:

- (iv) the Registrar of Titles do cancel the present document of titles to the property and issue replacement titles to be collected by the purchasers; and
- (v) the learned senior assistant registrar do execute the aforesaid memorandum of transfer in favour of the purchasers.

[15] The learned judge further ordered that the trustees pay the purchasers the costs of the action. His judgment was reported in *Cheok Swee Lee & Ors v Loo Choo Teng & Ors* [1997] 4 CLJ 587.

[16] The trustees appealed. The appellant, the fourth defendant in the 1981 civil suit, also appealed. Thus, there were two appeals before the Court of Appeal, viz, the trustees were the appellants in Civil Appeal No 556/97 and the appellant here was the appellant in Civil Appeal No 593/97. Both appeals were dismissed by the Court of Appeal. In delivering the judgment of the Court of Appeal, which was reported in the *Malayan Law Journal* (*Loo Choo Teng & Anor v Cheok Swee Lee & Ors and another appeal* [2000] 2 MLJ 257), Gopal Sri Ram JCA said (at p 265):

Having satisfied myself of the existence and the width of the jurisdiction in equity, I would vary the order of the learned judge by decreeing specific performance on terms that the vendors apply to court for formal sanction as provided in cl 8 of the sale and purchase agreement. Such application shall be made not later than seven days from the date of this judgment. In the event the vendors make default, the plaintiffs shall be at liberty to seek approval from the court for the sale of the subject property to them. Should sanction be refused by the court, it would be open to the vendors to move for the decree to be vacated on the ground of impossibility of performance. Additionally, the parties are generally at liberty to apply to the High Court for such orders or directions as may be necessary to give effect to the decree hereby granted.

[17] As a result of the decision of the Court of Appeal, the trustees, by way of Originating Summons No 24–330 of 2000, which is the subject-matter of this appeal before us, sought the following reliefs:

- (a) that they (ie, the trustees) be given permission to sell the property pursuant to cl 8 of the agreement and in accordance with the Probate and Administration Act 1959; and
- (b) that the permission as aforesaid be given to them (ie, the trustees) to sell the property to the purchasers at its market value as at the date of approval of this court or at such other price as the court deems fit and proper.

[18] It was endorsed on the summons that the trustees were seeking the reliefs on the ground that the property belongs to the estate and in connection thereto there was a requirement to obtain the permission of the court for the sale pursuant to cl 8 of the agreement and in accordance with the Probate

A

B

C

D

E

F

G

H

I

- A** and Administration Act 1959 and the order of the Court of Appeal. The purchasers and the appellant here were named defendants.

[19] At the end of the day, the learned judge granted the first relief sought, viz, that formal sanction is granted to the trustees for the sale of the property upon the terms of the agreement, namely, at RM1.60 per sq ft. The learned

- B** judge refused the second prayer sought, viz, that 'permission' be given to the trustees to sell the property to the purchasers at its market value.

[20] Against that decision the appellant appealed. The trustees did not appeal. As discussed earlier, the appellant, on his application, was added as a defendant to the 1981 civil suit. In his grounds of decision in the 1981 civil

- C** suit (*Cheok Swee Lee & Ors v Loo Choo Teng & Ors*) the learned judge had in relation to the appellant (the fourth defendant) said (at p 591):

As for the fourth defendant, he was added as a party, on his application, to the proceedings. The fourth defendant's pleaded defence, having abandoned and then reclaimed his amended defence in the course of the trial, is that the first defendant and Ong Thai Hong had no authority to enter into the agreement and that the land was the subject matter of the acquisition.

- D**

[21] His appeal to the Court of Appeal against the decision of the learned judge in the 1981 civil suit, as mentioned earlier, was dismissed.

- E** **[22]** Before us, the appellant's counsel referred to cl 8 of the agreement and the decision of the Court of Appeal. As discussed earlier, the Court of Appeal varied the order of the learned judge by decreeing specific performance on terms that the trustees apply to court for formal sanction as provided for in cl 8 of the agreement. It was also ordered that the application shall be made not later than seven days from the date of the judgment and that in the event the trustees make default, the purchasers shall be at liberty to seek
- F** approval from the court for the sale of the property to them and should sanction be refused by the court, it would be open to the trustees to move for the decree to be vacated on the ground of impossibility of performance. It was further ordered that the parties are generally at liberty to apply to the High Court for such orders or directions as may be necessary to give effect to the decree thereby granted.

- G**

[23] The appellant's counsel explained the appeal is against the decision of the learned judge in granting sanction to the sale of the property at the price of RM1.60 per sq ft. He pointed out that before the learned judge the trustees had exhibited in their affidavit a valuation report which reflected that the market value of the property as at 17 July 2000 was RM28m and that that valuation report was never challenged. Counsel did not however elaborate further as to who bore the burden of making such a challenge and or the purpose of making such a challenge. Be that as it may, he pointed out that the learned judge 'admitted' that the market value was RM28m and 'was cognizant' that the market value was as such.

- H**

- I** **[24]** Counsel contended the Court of Appeal had made an order which gives the learned judge room to exercise his discretion and had also 'made provisions for sanction to be refused' but the learned judge took the view

that the application for sanction was a mere formality. Counsel then attacked the decision of the learned judge. He argued that when sanction is applied for, the court should not be a 'rubber stamp' and 'follow the price of RM1.60 per square foot' but 'should follow the market value'. He insisted that the learned judge did not exercise his discretion in accordance with decided principles, namely:

- (a) he failed to consider that as this was a sale of trust property, the following matters are paramount:
 - (i) to obtain the best possible price for the estate;
 - (ii) that the time for determining the price is at the time of the hearing of the application for sanction notwithstanding that the price was reasonable at the time of the agreement;
- (b) he failed to protect the rights of the beneficiaries or rights of the estate, namely, he failed to take into account the value of the property at the time sanction was to be granted;
- (c) he took the purchasers' rights into account and not that of the beneficiaries; his decision goes against the principle of 'best possible price'.

[25] The appellant's counsel then referred to *Yap Yoke Luan & Ors v Ong Wee Tok & Ors* [1984] 1 MLJ 23 which he submitted is 'on all fours'. He also referred to *Che Ah and Che Yang Kelsom v Che Ahmad* [1941] MLJ 126, and *Re the Estate of Tunku Mohamed Jawa ibni Almarhum Sultan Abdul Hamid, deceased Tunku Ismail bin Tunku Mohamed Jawa & Anor v Tunku Baharom bin Tunku Mohamed Jawa & Ors* [1982] 2 MLJ 44 which were cited by Syed Agil Barakbah FJ in *Yap Yoke Luan & Ors v Ong Wee Tok & Ors*.

[26] In *Yap Yoke Luan & Ors v Ong Wee Tok & Ors*, the dispute revolved around the purchase of land belonging to the estate of Ong Sing Keng who died intestate. The first and second respondents were the administrators and the other respondents were the beneficiaries of the estate. The facts showed that the administrators executed a written agreement for the sale of the said land with the appellants who agreed to purchase it free from encumbrances subject to court approval as specified in cl 2 of the agreement. On the execution of the agreement, the appellants paid the sum of \$45,000 by way of deposit and the receipt thereof was acknowledged by the administrators. It was also agreed vide cl 6 of the agreement that in the event that leave of court was not obtained, the administrators would refund the said deposit. There was no dispute that the administrators failed to apply for leave as undertaken by them in cl 2 of the agreement. As a result of their inaction, the appellants filed a suit against the administrators and obtained an order from the High Court, Kuala Lumpur ordering the administrators to apply to the relevant High Court for leave to sell and transfer the said land within 14 days from the date of the order failing which the appellants were empowered to apply on their behalf. In compliance with the court order, the administrators filed an application by way of originating summons in the High Court, Seremban. Only the beneficiaries were cited as respondents as a result of which the appellants successfully applied to be added as the intervenors. The originating

- A** summons was heard and was dismissed with costs. The appellants appealed. The Federal Court dismissed the appeal. In delivering the judgment of the court, Syed Agil Barakbah FJ said (at p 25):

- B** In this regard we are of the view that the appellants as the proposed purchasers under a conditional contract were perfectly well aware that their contract had to be approved by the court before it could be carried out into effect and they had taken the risk of losing their bargain if the court refused to grant such approval. The duty of the court is to protect the rights of the beneficiaries and not to consider the interests of the proposed purchaser. In exercising its discretion the court will have to look into the facts and surrounding circumstances of the case ie whether the proposed sale was favourable to the beneficiaries and whether the administrators had acted with proper prudence in exercising their overriding duty to obtain the best possible price. The court is concerned that the price is a reasonable one not at the time the offer was made but at the time of hearing of the application for approval of the proposed sale. ... We agree with respect with the learned judge that the purchase consideration of \$150,000 was manifestly low in the light of the valuation of the market value of \$244,000 for the said land at the material time. It was apparent that the administrators had failed to carry out their duty as trustees to obtain the best possible price. Since most of the beneficiaries had not been consulted nor their consent been obtained, the administrators should have applied the common-sense rule of calling for a valuation report The fact that the appellants have paid 30% deposit and incurred expenses while in occupation of the said land may be a matter for consideration by the court but that cannot and does not override the duty of the court to see that the estate benefits as much as possible.

- E** [27] In *Che Ah and Che Yang Kelsom v Che Ahmad*, the administrator of an estate applied to court for leave to sell certain land which he had verbally agreed to sell at the price of \$12,777.50 subject to approval of the court. The Court of Appeal held that it is not for the court to consider the interests of the purchaser who is well aware of the risks he runs in entering into a conditional contract. The duty of the court is to protect the rights of those interested in the property and it is immaterial that at the time the offer was made the price was a reasonable one.

- G** [28] In *Re the Estate of Tunku Mohamed Jawa ibni Almarhum Sultan Abdul Hamid, deceased Tunku Ismail bin Tunku Mohamed Jawa & Anor v Tunku Baharom bin Tunku Mohamed Jawa & Ors* Syed Agil Barakbah J (as he then was) said (at p 45):

- H** The accepted principles adopted by the courts in cases where administrators apply for leave to sell, having executed a conditional contract subject to the leave of the court with purchasers and a beneficiary objecting to the contract thereof produces a higher offer is a prima facie duty to see that the estate benefits as much as possible. ... The duty of the court is to protect the rights of those interested in the property and it is immaterial that at the time the offer was made the price was a reasonable one.

[29] Premised upon the above, the appellant's counsel urged the court to allow the instant appeal with costs.

- I** [30] The trustees' counsel declined to proffer any views and left the matter to the court.

[31] In response, the purchasers' counsel contended the appellant cannot challenge the grant of the sanction. He pointed out that the appellant is a

beneficiary of the estate but was not a party to the agreement and that no other beneficiary was served or appeared when the application for sanction was sought. Further, the appellant was not the applicant in the court below and had not even filed any affidavit. Counsel also pointed out that the application for sanction was a continuation of the 1981 civil suit. When the purchasers filed the 1981 civil suit, the appellant on his own initiative applied to be joined as a defendant and filed a defence. In that suit, the purchasers claimed no relief against the appellant. The appellant also did not lodge any counterclaim to set aside the agreement. His stand throughout was that his consent had not been obtained prior to the execution of the agreement.

[32] The purchasers' counsel argued when the Court of Appeal directed the trustees to apply for formal sanction, the Court of Appeal expressly did so to comply with cl 8 of the agreement. The only parties to the agreement were the trustees and the purchasers and no one else.

[33] I have noted that in his statement of defence in the 1981 civil suit, the appellant denied the validity of the agreement and averred that the trustees could not lawfully enter into the agreement without the prior approval of the court and without his prior approval. He also alleged the following:

- (a) that the trustees had exercised their powers in breach of trust, improperly and without lawful authority;
- (b) that the purchasers were aware that the trustees did not have lawful authority to enter into the agreement;
- (c) that even if the agreement was valid, which is denied, the agreement had been terminated as the property was not released from the notice of acquisition within a period of two years from the date of the agreement.

[34] Counsel pointed that the appellant's attempt to amend his statement of defence in the 1981 civil suit 14 years after the close of pleadings, wherein he proposed to, inter alia, challenge the authority of one of the trustees to execute the agreement, namely, the second respondent here and to aver that the purchase price stated in the agreement was below market value and that the sale of the property was against the interest of the estate as a whole, was dismissed by the learned judge (see *Cheok Swee Lee & Ors v Loo Choo Teng & Ors* [1996] 3 CLJ 433).

[35] Premised upon the above, counsel argued the issue of fair value was not within the perimeters of the present appeal. Since the appellant had failed to raise that issue in the 1981 civil suit, he cannot now raise it. There is a bar personal to him. Counsel pointed out the appellant did attempt to adduce evidence of current value of the property in the 1981 civil suit even though he was not party to the agreement and that no relief was sought against him but it was disallowed by the judge on the grounds that it had not been pleaded and that no relief was sought against him.

[36] As mentioned earlier, the Court of Appeal had dismissed the appeal by the trustees and the appellant against the decision of the learned judge in the 1981 civil suit. The Court of Appeal upheld the learned judge's finding that the agreement was valid and binding upon the parties. In delivering the judgment of the court, Gopal Sri Ram JCA said (at pp 264–265):

A

B

C

D

E

F

G

H

I

- A** In the present instance, it is amply clear that the learned judge failed to consider sufficiently, or at all, the effect of cl 8 when exercising his discretion to decree specific performance. This is therefore a case which in my view warrants appellate interference. However, having regard to the special circumstances of this case it would, in my judgment, be unjust to the plaintiffs to deny them specific relief altogether. It must not be forgotten that there is here a contract for the sale of immovable property. It is
- B** the kind of obligation that statute rebuttably presumes to be incapable of being remedied by an award of monetary compensation (see s 11(2) of the Specific Relief Act 1950). Moreover, this appears to be a case where the vendors, having entered into a perfectly valid transaction went about inventing all sorts of excuses to get out of it. Having failed in their efforts, it would be quite wrong to permit them to succeed, as it were, on the strength of a mere side-wind. The main obstacle envisaged by the parties to the sale was the State's refusal to release the subject property from compulsory acquisition. That hurdle having been crossed, all that remains is the mere formality of obtaining the court's sanction for the sale. This is therefore an appropriate case to decree specific performance, not as ordered by the learned judge, but on terms.
- C**

- D** [37] Thus, the only thing remaining to finalize the agreement made between the trustees and the purchasers is the 'mere formality of obtaining the court's sanction for the sale'. The trustees made the application and the learned judge granted the sanction for the sale of the property upon the terms of the agreement, namely, at RM1.60 per square foot. The appellant appealed against that decision and the matter is now before us.

- E** [38] What attracted my attention was the fact that in pursuing the application for sanction, the trustees did not name or omitted to include Loh Gan Teong (the eighth respondent) who was one of the purchasers as defendant but saw it fit to name the appellant as one. When the matter came up for hearing before the learned judge, the omission was discovered and by consent, Loh Gan Teong was added as defendant.

- F** [39] At the hearing before the learned judge, the trustees forwarded the same arguments as canvassed by the appellant, namely, that the rights of the beneficiaries are superior to the rights of the purchasers and that the time for determining the price is the current price at the time sanction is applied for notwithstanding that the price might have been a fair price at the time the agreement was entered into. The trustees pointed out that when the
- G** agreement was entered into, the appellant and the other beneficiaries agreed to sell at RM1.60 per sq ft but they do not agree now because of the current value of the property. Although the trustees admitted that the appellant and the other beneficiaries only voiced their objections after the decision of the Court of Appeal in the year 2000, the trustees urged the court to consider the current price when granting the sanction.
- H**

- I** [40] Before the learned judge, the appellant's counsel submitted the appellant, being one of the beneficiaries, had a right to object to the sale at RM1.60 per sq ft. He insisted that the court had a duty to protect the interest of the estate as a whole. It was conditional sale and the Court of Appeal ordered sanction as 'a pre-condition'. What is important is whether the sale would benefit the estate and whether the price is reasonable, given the present circumstances. Given the wide discrepancy, namely, that RM1.60 per sq ft is not a reasonable price, sanction should be refused.

[41] Before the learned judge, the purchasers' counsel pointed out the Court of Appeal upheld the finding of the court in the 1981 civil suit that the agreement was valid and binding upon the parties. As to the price, counsel contended the material date for valuation was the date of the agreement, viz, 8 January 1979. He also pointed out that the acquisition price was RM0.60 per sq ft whereas the sale price was RM1.60 per square foot. The property was valued by the trustees. The reason why the sale and purchase was not performed by the trustees was not because of consent or value but because of the acquisition and the reason for the non-performance was because of a wilful refusal to perform the sale and purchase, rather than the non-fulfillment of any conditions. There was a failure to apply for sanction due to refusal to perform. Counsel further contended that it is not open to the trustees to come to court to seek sanction and simultaneously apply for a new valuation. The court of Appeal only wanted cl 8 to be considered and that all that was lacking was the formal sanction.

[42] In my view, the only issue before us is whether the learned judge had under the circumstances exercised his discretion judiciously when he granted sanction for the sale of the property upon the terms of the agreement, namely at RM1.60 per sq ft. I note that according to the *Concise Oxford Dictionary* (9th Ed), the word 'sanction', inter alia, means 'confirmation' or 'ratify'.

[43] In the 1981 civil suit, in dealing with the appellant's averment that he had not given his consent for the sale of the property, the learned judge said (at p 607 of the reported judgment):

On the fourth defendant's denial that he had not given his consent for the sale, he was not only not supported by the documentary evidence (he was informed, on 12 October 1977, of the proposed sale at RM0.40 psf see PB3(3-5); he was informed, on 1 March 1979, of the sale — see PB1(12); there is no record of the fourth defendant's objection to the sale in the minutes of the meeting of the trustees and beneficiaries — see PB3(12-14); the second defendant's letter to all beneficiaries, and it was not controverted by the fourth defendant has it that every beneficiary agreed to the sale at RM1.60 per square foot — see PB3(16-18), a bare denial as such, but was also devoid, so it is perceived, of all *bona fides*.

[44] In the 1981 civil suit, in relation to the position of the trustees in administering the estate at the material time the agreement was entered into, the learned judge said (at p 609 of the reported judgment):

It would appear therefore that the first defendant and OngThai Hong, as of 15 February 1978, were the only trustees of the Estate with administrative powers (the fourth defendant with Boey Khoon Heng effectively sidelined) and that the second defendant appointed a trustee on 8 January 1979 was empowered to sign and execute all documents relating to the administration of the Estate 'in substitution' of the fourth defendant and Boey Khoon Heng. Furthermore, by a Power of Attorney dated 5 October 1978, the said Ong Thai Hong appointed the second defendant his lawful attorney to carry out his duties *qua* trustee of the Estate. Therefore, on 8 January 1979, both the first and second defendants (in the case of the second defendant, as attorney if not trustee) were the only persons empowered to administer the Estate.

[45] What is clear from the above findings made by the learned judge were the following:

A

B

C

D

E

F

G

H

I

- A** (a) prior to the execution of the agreement, the appellant as beneficiary gave his consent for the sale of the property;
- (b) on the date the agreement was executed, the trustees (the first and second respondents here) were the only persons empowered to administer the estate.
- B** [46] Before us, the appellant complained that despite his objection, the learned judge granted the sanction. I cannot see any merit in his complaint. The evidence showed the appellant and also the other beneficiaries were fully aware of the agreement, the price and the 1981 civil suit. The trustees failed to apply for sanction after the property was released from the intended proposed acquisition by the State Authority in 1984. Clause 8 of the agreement made it mandatory for the trustees to apply to court for 'a formal sanction' to sell the property in accordance with the Probate and Administration Ordinance 1959. There was no term in the agreement that the purchasers should apply for such sanction. When the learned judge granted the sanction, it was confined to the terms of the agreement and as at the date of the agreement.
- C** In his grounds of decision in granting the sanction, which was reported in the *Malayan Law Journal* (*Loo Choo Teng & Anor v Cheok Swee Lee & Ors* [2001] 1 MLJ 216), the learned judge reiterated what he said in *Cheok Swee Lee & Ors v Loo Choo Teng & Ors* at pp 618–619 of the reported judgment, viz:
- D** In the instant case, the first and second defendants had an express duty (cl 8) to apply for that formal consent, the general duty to co-operate and not to prevent the fulfillment of cl 8 (applying *Mackay v Dick* [[1881] 6 App Cas 251]) to act *bona fide* (perhaps reasonably) to procure the fulfillment of cl 8 (applying *Hudson v Buck* [[1877] 7 Ch D 683]). The said agreement will be construed so far as possible in such a manner as not to permit the defendants to take advantage of the first and second defendants' failure to perform cl 8 (see *Rede v Farr* [1817] M&S 121, where a tenant who had failed to pay his rent asserted that by reason of a proviso re-entry his lease was at an end. Lord Ellenborough said '... this provision ... would be contrary to an universal principle of law, that a party shall never take advantage of his own wrong ...'. In *New Zealand Shipping Co v Societe des Ateliers et Chantiers de France* [1919] AC 1, Lord Atkins said: 'But if the stipulation be that the contract shall be void on the happening of an event which one party or other of them can by his own act or omission bring about, then the party, who by his act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case in a roundabout way, but either way putting an end to the contract') such that the defendants cannot rely on their own failure to apply for formal consent as bringing the agreement to an end.
- E**
- F**
- G**
- H** [47] The trustees had the power of sale. The appeal records (at p 203) showed that on 25 August 1975, in Originating Summons No 156 of 1975, the High Court at Penang ordered that the deceased's immovable property 'be sold with the approbation of the judge free from encumbrances, (if any), and subject to the encumbrances (if any) of such of them as shall be agreed upon ...'. Thus the court had already given the trustees power to sell the property subject to affirmation by a judge. The appellant and also the other beneficiaries did not object to the sale at the material time. Further, at the time of the sale in 1979, a valuation report was obtained. It was also not disputed that the acquisition value was only RM0.60 per sq ft.
- I**

[48] I would agree with the submission of the purchasers' counsel that s 60(4) of the Probate and Administration Act 1959, which provides that 'an administrator may not, without the previous permission of the court — (a) ... transfer by sale ... any immovable property ...', has no bearing upon the circumstances here. The effect of that provision is that a sale of immovable property by an administrator would not be binding or enforceable unless he has the previous permission of the court. That provision is certainly not applicable here. The trustees prime duty is to carry out the terms of the trust. They already had the power to sell prior to entering into the agreement.

[49] I am of the view that the cases referred to by the appellant's counsel can clearly be distinguished on the facts. In *Yap Yoke Luan & Ors v Ong Wee Tok & Ors*, the deceased died intestate. The administrators (the respondents) executed a written agreement for the sale of the land in question with the purchasers (the appellants) who agreed to purchase it free from encumbrances subject to court approval. The other respondents were the beneficiaries of the estate. It was agreed that in the event that leave of court was not obtained, the administrators would refund the deposit paid. The administrators failed to apply for leave. The purchasers filed a suit against the administrators and obtained an order from the High Court at Kuala Lumpur ordering the administrators to apply to the relevant High Court for leave to sell and transfer the land. In compliance with the court order the administrators filed an application by way of originating summons in the High Court at Seremban citing the beneficiaries as respondents. The purchasers were allowed to intervene. The originating summons was dismissed. The purchasers' appeal to the Federal Court was also dismissed. The learned High Court judge found that the purchase consideration of \$150,000 was manifestly low in the light of the valuation of the market value of \$244,000 for the said land at the material time. It was also found that the administrators had failed to carry out their duty as trustees to obtain the best possible price. The facts showed that most of the beneficiaries had not been consulted nor their consent been obtained neither did the administrators called for a valuation report before entering into the conditional contract.

[50] The facts and circumstances found in *Che Ah and Che Yang Kelsom v Che Ahmad*, and *In Re the Estate of Tunku Mohamed Jewa ibni Almarhum Sultan Abdul Hamid*, referred to by the appellant's counsel, also dealt with conditional contracts of sale of immovable property entered into by administrators of estates which required leave of the court.

[51] In the present case on appeal before us, the facts and the surrounding circumstances were clearly different. The trustees had the power to sell and in exercising that power, had taken into regard the rights of the beneficiaries including obtaining their prior consent. The evidence showed that every beneficiary agreed to the sale at RM1.60 per sq ft. The agreement was a valid agreement and was binding on the trustees and purchasers. The only thing left to be done by the trustees was to apply to court for a formal sanction to sell the property. The learned judge had meticulously considered all the facts and the surrounding circumstances before arriving at the decision that he did. As observed by Gopal Sri Ram JCA in *Loo Choo Teng & Anor v Cheok Swee Lee & Ors*

A

B

C

D

E

F

G

H

I

- A (at p 264), ‘this appears to be a case where the vendors, having entered into a perfectly valid transaction went about inventing all sorts of excuses to get out of it’. His Lordship then went on to say as follows (at pp 264–265):

The main obstacle envisaged by the parties to the sale was the State’s refusal to release the subject property from compulsory acquisition. That hurdle having been crossed, all that remains is the mere formality of obtaining the court’s sanction for the sale.

B

- [52] Before us, the appellant’s counsel argued that ‘when sanction is applied for, the court should not be a rubber stamp and follow RM1.60 per sq ft and should follow market value’. The Court of Appeal had decreed specific performance and stated that ‘all that remains is the mere formality of obtaining the court’s sanction for the sale’. In his grounds of decision in granting sanction, the learned judge held the sanction must be determined with reference to the agreed price and that the agreed price of RM1.60 per sq ft at the date of the agreement was the best price obtained for the beneficiaries. Looking at his grounds of decision, I do not think that the learned judge had acted like a ‘rubber stamp’ when he granted the sanction. In relation to the application itself, he observed (at p 223):

D

Strictly speaking, there is no application for formal sanction to sell the said land upon the terms of the agreement. Only, this application ‘for permission to sell the said land at the market value of the said land at the date of approval by this honourable court, or at such other price as this honourable court deems fit and proper.

E

- [53] After giving due consideration to the facts and the surrounding circumstances, the learned judge said (at pp 225–226):

F

Specific performance was ordered, at RM1.60 per sq ft. This proceedings cannot nullify that result. Sanction or no sanction must be decided, with the agreed price being the price. If the instant plaintiffs had applied for formal sanction in accordance with the agreement, RM1.60 psf would have been the price before the court, and RM1.60 psf, would have been reflective then of the market price. As correctly said by Dato’ Sethu for the instant first to fifth and seventh defendants, the trustees of the estate themselves valued the said land at RM1.60 per sq ft. In other words, the instant plaintiffs had obtained the best price for the beneficiaries of the estate (*Buttle & Ors v Saunders & Anor* [1950] Ch D 193). Not surprisingly, the beneficiaries themselves, who were duly informed of the sale, did not object to the sale (see p 28 of the notes of evidence — *Cheok Swee Lee & Ors v Loo Choo Teng & Ors*). Mr Abraham said, and Mr Ong agreed, that at the material time the instant sixth defendant agreed to the sale at RM1.60 psf. If an application for formal sanction had been made in accordance with the agreement, there would have been no reason to refuse formal sanction. Formal sanction, as the Court of Appeal said, was ‘[a] mere formality ...’. Reasonably, formal sanction for the sale would not have not been given. That being the case, then on the alternate prayer of the instant plaintiffs for ‘permission to sell at such other price as this honourable court deems fit and proper’ (and that alternate prayer invites the court to grant formal sanction to sell upon the terms of the agreement), it is only just and equitable, so as to put the parties to the position had the agreement been performed as agreed, that formal sanction be granted for the sale of the said land upon the terms of the agreement. The reasons given for refusal of formal sanction are just not acceptable.

G

H

I

- [54] At the end the day the learned judge granted formal sanction to the trustees for the sale of the property upon the terms of the agreement, namely,

at RM1.60 per sq ft. I am of the view that the learned judge had taken all factors into consideration and I find nothing wrong with his exercise of discretion in granting the sanction. For these reasons, I would dismiss this appeal with costs and order that the deposit be paid to the third to eighth respondents towards the account of taxed costs.

Richard Malanjum JCA (dissenting):

[55] Before us is an appeal against the decision of the High Court Penang in relation to an application by way of originating summons for the following relief:

- (a) that the plaintiffs be given permission to sell land previously known as Lot 532, Mukim 12, Daerah Barat Daya and now known as Lot 2347, 2348, 2349 and 2350 all in Mukim 12 Daerah Barat Daya, Penang ('the said land') pursuant to cl 8 of the sale and purchase agreement between the plaintiffs and the first to fifth (and seventh) defendants dated 8 January 1979 and in accordance with the Probate and Administration Act 1959;
- (b) that the permission as aforesaid be given to the plaintiffs to sell the said land to the first to fifth (and seventh) defendants abovenamed at the market value of the said land, at the date of approval by this honorable court or at such other price as this honorable court deems fit and proper.

[56] Having heard the matter the learned High Court judge granted the application for formal sanction with these words, inter alia, ... 'formal sanction is hereby granted to the instant plaintiffs for the sale of the said land upon the terms of the agreement, namely at RM1.60 psf; all other "permission" sought is refused, and the instant plaintiffs are to bear all costs of this application'.

[57] From the above it is obvious that only the first prayer was granted. And the appellant, who is also one of the beneficiaries of the estate of the deceased, the late Ong Joo Sun, ('the deceased') was in fact the sixth defendant in the court below. Dissatisfied with the decision of the learned judge the appellant now appeals.

[58] I had the privilege of reading the majority judgments of the court in draft and having considered the reasoning and conclusion therein, with respect, I am unable to agree and thus inclined to give my dissenting view on the issues raised in this appeal.

[59] The background facts of this case under appeal have been well-rehearsed in the majority judgment of my learned brother Mohd Ghazali JCA. In any event there is hardly any dispute in them. Briefly this is a case involving the sale of land described as Lot 532, Mukim 12, Daerah Barat Daya and now known as Lot 2347, 2348, 2349 and 2350 all in Mukim 12 Daerah Barat Daya, Penang, ('the said land'). It belongs to the estate of the deceased who died testate. When proving his will the High Court on 25 August 1975 directed, inter alia, that the deceased's estate be administered according to the terms of the will and that his immovable properties be sold and the proceeds be paid into court to the credit of his estate. But by a gazette notification No. 103 published on 25 April 1974, the State Government of Penang declared its intention to acquire the said land.

- A** [60] On 8 January 1979, a sale and purchase agreement was entered into by the additional trustee of the deceased's estate, namely one Ong Thai Hong with the purchasers who are the respondents in this appeal. The purchase price was calculated at RM1.60psf. A deposit of RM150,000 which was equivalent to approximately 5% of the total purchase price was paid by the purchasers at the date of the sale and purchase agreement. One Ong Gaik Kee
- B** (the second respondent in this appeal) who was also appointed as an additional trustee executed the sale and purchase agreement on behalf of Ong Thai Hong.

- C** [61] Due to disagreement on the issue of whether the said land had been released from being earmarked for acquisition by the State Government a civil suit was launched by the purchasers against the additional trustees. The end result was that this court ('the first appeal') affirmed the decree of specific performance granted by the High Court of the sale and purchase agreement. However, having made the order, one issue was left, namely, the compliance of cl 8 therein. That clause reads:

- D** The trustees shall also apply to court for a formal sanction to sell the property in accordance with the Probate and Administration Ordinance 1959.

[62] And this court in the first appeal thus directed the compliance of that clause with these words (see *Loo Choo Teng & Anor v Cheok Swee Lee & Ors and another appeal* [2000] 2 MLJ 257, at p 265):

- E** Having satisfied myself of the existence and the width of the jurisdiction in equity, I would vary the order of the learned judge by decreeing specific performance on terms that the vendors apply to court for formal sanction as provided in cl 8 of the sale and purchase agreement. Such application shall be made not later than seven days from the date of this judgment. In the event the vendors make default, the plaintiffs shall be at liberty to seek approval from the court for the sale of the subject property to them. Should sanction be refused by the court, it would be open
- F** to the vendors to move for the decree to be vacated on the ground of impossibility of performance. Additionally, the parties are generally at liberty to apply to the High Court for such orders or directions as may be necessary to give effect to the decree hereby granted.

- G** [63] Meanwhile, in granting the sanction aforementioned the learned judge in the court below also said this, inter alia, at pp 218-226 (see *Loo Choo Teng & Anor v Cheok Swee Lee & Ors* [2001] 1 MLJ 216):

- H** But this is not really the instant plaintiffs' application, in the sense that the instant plaintiffs are eager applicants applying on their own volition for the said 'permission'. Rather, the instant plaintiffs were ordered by the Court of Appeal to make an application for formal sanction for the sale of the said land. Otherwise, for sure, this application would not have been made. If not for the order of the Court of Appeal, it is most unlikely that this application which ought to have been made but was never made by the instant plaintiffs in all these last 19 years would ever be made, would ever see the light of day.

- ...
- I** Mr Abraham would not admit it, but clearly beyond all argument, the Court of Appeal who held that the agreement was a 'perfectly valid transaction', (also) decreed specific performance — and of what, 'of the vendors' obligations under the sale and

purchase agreement' — albeit upon terms. The instant plaintiffs were ordered to apply to court for formal sanction for the sale of the said land upon the terms of the agreement. The term of the agreement was the sale of the said land at RM1.60 psf. It follows, that the instant plaintiffs should apply to court, or else would 'make default', for formal sanction for the sale of the said land at RM1.60 psf. The instant plaintiffs were not ordered, and so were not sanctioned by the Court of Appeal, to apply to court for formal sanction for the sale of the said land upon 'terms' alien to the agreement. After all, the equitable relief upon terms decreed — specific performance — was to enforce against the instant plaintiffs the duty of doing precisely what they agreed by the agreement to do (see *44 Halsbury's* (4th Ed) para 401, and *Black's Law Dictionary* (7th Ed) on specific performance; see also *M Ratnavale v S Lourdenadin*; *M Mahadevan v S Lourdenadin* [1988] 2 MLJ 371 at p. 377). ... Really, it is more than irrefragable that the decree of specific performance in the instant case could not have been, could never have been, to enforce 'terms' alien to the agreement. Rather, the plain and obvious effect of the decree of specific performance upon terms of the Court of Appeal is that, if sanction is obtained, the agreement shall be implemented exactly as was agreed by the parties, that is, at RM1.60 psf. 'Should sanction be refused by the court, it would be open to the (instant plaintiffs) to move for the decree to be vacated on the ground of impossibility of performance'. That is the pith of the decree of specific performance upon terms of the Court of Appeal who made it absolutely clear that the decree of specific performance of the High Court was varied but never set aside.

The instant plaintiffs were undoubtedly thrown a lifeline — 'should sanction be refused by the court, it would be open to the (instant plaintiffs) to move for the decree to be vacated on the ground of impossibility of performance'. But the instant plaintiffs have not taken that lifeline. Strictly speaking, there is no application for formal sanction to sell the said land upon the terms of the agreement. Only, this application "for permission to sell the said land at the market value of the said land at the date of approval by this honourable court, or at such other price as this honourable court deems fit and proper".

...

If an application for formal sanction had been made in accordance with the agreement, there would have been no reason to refuse formal sanction. Formal sanction, as the Court of Appeal said, was '[a] mere formality ...'. Reasonably, formal sanction for the sale would not have not been given. That being the case, then on the alternate prayer of the instant plaintiffs for 'permission to sell at such other price as this honourable court deems fit and proper' (and that alternate prayer invites the court to grant formal sanction to sell upon the terms of the agreement), it is only just and equitable, so as to put the parties to the position had the agreement been performed as agreed, that formal sanction be granted for the sale of the said land upon the terms of the agreement. The reasons given for refusal of formal sanction are just not acceptable. This is not your usual run of the mill application for formal consent usually applied contemporaneously, and/or at or about the time of the proposed sale. If it is, then the current (year 2000) market value and the present objections to the price will be relevant. The agreed purchase price is not reflective of the current (year 2000) market value — how could it be and what would still be after 19 years of rapid economic development? — only because the instant plaintiffs, who fallaciously held that the agreement had become null and void when the acquisition was not withdrawn within two years from the execution of the agreement, would not apply no matter what, for formal sanction. However could the instant plaintiffs harbour hopes to profit? 'Wrong must not win by technicalities' (Aeschylus, *The Eumenides* (458 BC) tr Richmond Lattimore) The instant plaintiffs must reap what they sow — the whirlwind.

A

B

C

D

E

F

G

H

I

A [64] I have taken the liberty to reproduce as precisely as it could be done in an attempt to trace what was in the mind the learned judge before coming to his decision to grant the sanction on the term as he did.

B [65] Now, cl 8 of the sale and purchase agreement gave due recognition to the 'Probate and Administration Ordinance 1959', now an Act ('the 1959 Act'). Hence, cl 8 read with the 1959 Act was a term by itself to be complied with. It is not therefore surprising that this court in affirming the decree of specific performance said this (at p 265):

... I would vary the order of the learned judge by decreeing specific performance on terms that the vendors apply to court for formal sanction as provided in cl 8 of the sale and purchase agreement.

C [66] Indeed in the judgment of this court in the first appeal his Lordship Gopal Sri Ram JCA observed that while the learned judge in the court below decreed specific performance of the sale and purchase agreement he '... failed to consider sufficiently, or at all, the effect of cl 8 when exercising his discretion'.

D [67] Thus, the next question to ask is this: in law what is expected of the learned judge in the court below when considering an application for sanction as stipulated in cl 8 of the sale and purchase agreement?

E [68] With respect, from the judgment of the learned judge in the court below it would appear that he was too preoccupied with and perhaps misconstrued what were said by this court in the first appeal. He completely ignored and failed to consider his primary function, namely to exercise his discretion judiciously, when considering the application for sanction made in compliance with cl 8 of the sale and purchase agreement. At no time this court in the first appeal severed the relevant prerequisites of the 1959 Act from cl 8.

F [69] No doubt in this case the deceased died testate. And when the will was proved the trustees were empowered vide the court order to sell the immoveable properties of the estate of the deceased. But surely that could not mean complete freedom for the trustees to act in any manner as they wished. If that is the law then beneficiaries to an estate of a person who dies intestate have a better protection in view of the provisions of the 1959 Act and the judicial pronouncement of the law thereto. Thus, in the instant case the terms of the will should be observed. Additionally cl 8 made specific reference to the 1959 Act which the parties to the sale and purchase agreement and the court below should not simply ignore.

G [70] In *Yap Yoke Luan & Ors v Ong Wee Tok & Ors* [1984] 1 MLJ 23 a clause in the sale agreement of some pieces of land belonging to the estate of the deceased person stipulated that the administrators as the trustees of the estate must apply for leave from the court in order to finalize the sale. They failed to do so. Yet when leave was finally applied for by the purchasers after a lapse of seven years from the execution of the sale agreement the High Court and the then Federal Court approached the issue by stating that '(T)he duty of the court is to protect the rights of the beneficiaries and not to consider the interests of the proposed purchasers. In exercising its discretion the court will have to look into the facts and surrounding circumstances of

the case ie, whether the proposed sale was favourable to the beneficiaries and whether the administrators had acted with proper prudence in exercising their overriding duty to obtain the best possible price. The court is concerned that the price is a reasonable one not at the time the offer was made but at the time of hearing the application for approval of the proposed sale’.

[71] In the instant case cl 8 of the sale and purchase agreement also stipulated that the trustees must apply for sanction from the court in accordance with the 1959 Act. As such it is my view that the primary function of the court below when exercising its discretion is to consider the interests of the beneficiaries to the estate of the deceased. Of course, there must be an exercise of discretion in the first place. Otherwise the intended purpose of cl 8 would be rendered illusory.

[72] Accordingly the ultimate question to ask is this: in this case did the learned judge in the court below exercise his discretion when considering the application and if so, was there a proper exercise according to law?

[73] This court in its judgment in the first appeal clearly stated thus: ‘... Should sanction be refused by the court, it would be open to the vendors to move for the decree to be vacated on the ground of impossibility of performance’. The foregoing was a clear indication that proper exercise of discretion was expected from the learned judge. Hence, I do not think it was the intention of this court in the first appeal to stifle the discretion of the learned judge merely by the usage in the judgment of the words ‘apply to court for formal sanction’.

[74] Unfortunately the learned judge in the court below appeared to have taken that position when he said in his judgment these words at p 222:

The instant plaintiffs were ordered to apply to court for formal sanction for the sale of the said land upon the terms of the agreement. The term of the agreement was the sale of the said land at RM1.60 psf. It follows, that the instant plaintiffs should apply to court, or else would ‘make default’, for formal sanction for the sale of the said land at RM1.60 psf. The instant plaintiffs were not ordered, and so were not sanctioned by the Court of Appeal, to apply to court for formal sanction for the sale of the said land upon ‘terms’ alien to the agreement.

[75] In fact this court in the first appeal when affirming the decree of specific performance said this at p 265:

I would vary the order of the learned judge by decreeing specific performance *on terms that* the vendors apply to court for formal sanction as provided in cl 8 of the sale and purchase agreement. (Emphasis added.)

[76] With respect, I do not think those words of this court in the first appeal could, as understood by the learned judge in the court below to mean ‘ordered to apply to court for formal sanction for the sale of the said land upon the terms of the agreement. The term of the agreement was the sale of the said land at RM1.60psf’. Hence, I have no reason to accept that he did exercise his discretion when granting the sanction as he did. And on this ground alone that I would allow this appeal, namely, the failure of the learned judge to exercise his discretion.

- A** [77] Even if the learned judge in the court below did exercise his discretion as contended, I am of the opinion that he did so not according to law. He took into account irrelevant matters or failed to take into account relevant matters. For instance, he held the view that he had no choice but to obey the decision of this court in that any sanction given should be reflective of the terms of the sale and purchase agreement particularly on the selling price of the said land.
- B** The learned judge also appeared to hold the view that the sanction to be given was a foregone conclusion. He failed to consider that refusal as indicated by this court in the first appeal was an option available to him.

- C** [78] And legal principle pertaining to an exercise of discretion was restated by this court in the first appeal in this fashion at p 264:

- I take it as settled law that the initial function of this court in a case as the present is one of review only. The fact that I may differ with the learned judge in the way discretion was exercised affords no ground to reverse him. If, however, it is demonstrated that the trial judge failed to take into account relevant considerations or took into account irrelevant considerations or misdirected himself in law or that his order is plainly unjust, then and then only is this court entitled to interfere with the exercise of discretion.
- D**

- [79] From the judgment of the court below it is obvious to me and as indicated above that the learned judge erroneously bound himself of a perceived 'direction' from this court in the first appeal. He failed to consider that it was his duty 'to protect the rights of the beneficiaries'. And he also failed to appreciate the legal principle that he should be 'concerned that the price is a reasonable one not at the time the offer was made but at the time of hearing the application for approval of the proposed sale'. With respect I therefore find that the learned judge failed to take into account relevant matters and misdirected himself on the law when exercising his discretion, if he ever did.
- E**
- F** This is another reason for my allowing this appeal.

- [80] Accordingly, I think this is a suitable case which warrants interference by this court in the exercise of discretion by the learned judge in the court below. I would therefore vary the terms of the sanction granted. In lieu thereof I would grant the sanction to sell the said land to the 'first to fifth (and seventh) defendants'/respondents subject to its current 'market value at the date' hereof. Effectively, it is the second prayer sought for in the originating summons. And since in this case there was no challenge from the respondents to the valuation report submitted I am of the view that the price as valued should be accepted as the market value.
- G**

- H** [81] I have considered the other points taken up in this appeal by both sides, inter alia, that the appellant was not a party to the sale and purchase agreement, that the beneficiaries were consulted before the sale, and that in the first suit the issue of the value of the said land was also raised but was not pursued subsequently. In view of the reasons upon which I have come to my decision I do not think these issues could in any way persuade me to alter my conclusion herein. And specifically on the delay in making the application I do not think that should have any prejudicial effect on the interests of beneficiaries to the estate. The application should have been made by the
- I**

relevant trustees. Thus, if there was any unjustified delay the estate and the beneficiaries should not be made to bear the consequences. In any event in the instant case the fact that there was a dispute on whether the State Government of Penang had released the said land should be taken into account and not for the learned judge in the court below to conclude that '(T)he instant plaintiffs must reap what they sow — the whirlwind'.

[82] This appeal is therefore allowed in terms aforementioned with costs to the appellant to be taxed. The deposit paid is to be refunded to the appellant.

Appeal dismissed.

Reported by Lim Lee Na

A

B

C

D

E

F

G

H

I